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There is some strong dissent in the United States to the proposition here contended for. The leading case for the stand against punishing *extra*-territorial crimes is *People* v. *Merrill*[16] in New York. In that case, a state statute provided for the punishment of anyone who should sell a negro that had been kidnapped from the state. The court refused to give it force as applied to a sale outside the state. Other cases oppose the doctrine just as strongly,[17] so that there is no uniformity on the question in the states, however clear it should be from the point of view of logic and the theory of government. But on just one point, practically every sovereignty agrees. That is, that it has the power to punish for all crimes done on a ship under its flag, whether in its own waters, on the high seas, or in foreign ports,[18] even though the foreign state may also have jurisdiction over the crime.[19]

J. F. N.

EVIDENCE—PROOF OF ONE SEXUAL CRIME AT A TRIAL FOR ANOTHER—In *People* v. *Gibson*,[1] a prosecution for statutory rape, evidence that the accused had sexual intercourse with a playmate of prosecutrix in the same room a few minutes after the act charged was not admitted, on the ground that the two acts were not so connected as to be part of the same transaction.

"The general rule is that on a prosecution for a particular crime evidence which in any manner shows or tends to show that the accused has committed another crime wholly independent of that for which he is on trial, even though it be a crime of the same sort, is irrelevant and inadmissible."[2] That is a principle to which no court will dissent, but it is upon the application of the exceptions to the general rule that the courts differ. The following exceptions may be regarded as the most important, being those which are included in the classification given by most authorities.[3] Evidence of other offenses is admissible if such offenses are relevant (1) as part of the *res gestae*, or to prove or show (2) identity of person or crime, (3) knowledge, (4) intent, (5) motive, (6) system or scheme, (7) malice. There must be some logical and natural connection between the extraneous crime offered in evidence and the crime charged, and whether the connection necessary to render it relevant and admissible exists is a question for the trial judge to determine. If the evidence be so dubious that the judge does not clearly per-

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[16] People v. Merrill, 2 Parker's N. Y. Cr. Rep. 590 (1855).

[17] U. S. v. Smiley, 6 Sawyer 640 (U. S. C. C., 1864); Johnson v. Commonwealth, 86 Ky. 122 (1887); Cruthers v. State, 161 Ind. 139 (1903); State v. Cutshall, 110 N. C. 538 (1892).

[18] Reg. v. Armstrong, 13 Cox C. C. 184 (Eng., 1875); Reg. v. Anderson, 11 Cox C. C. 198 (Eng., 1868).

[19] Wildenhus's Case, 120 U. S. 1 (1886).

[1] 99 N. E. Rep. 599 (Ill., 1912).

[2] 12 Cyc. 405.

[3] Wigmore, Evidence, Sects. 300, 306; Wharton, Criminal Evidence (10th Ed., 1912) Sect. 31; People v. Molineaux, 168 N. Y. 264, 293 (1901).

ceive the connection, the benefit of the doubt should be given to the accused and the evidence rejected.[4] Such is the test and it is obvious that evidence will often be deemed relevant by one judge and not by another. The discussion in this note will be confined principally to the admissibility of other offenses in prosecutions for rape and other sexual crimes.

A consideration of the cases of prosecution for rape where a different kind of crime was offered shows that such evidence is admissible (1) if it is a part of the *res gestae*, *i. e.*, if a narration of the crime charged necessarily involves a description of the other offense, or, to use a phrase much preferred by Professor Wigmore,[5] if the two crimes are "inseparably connected." Thus, in a charge of rape, evidence that the accused struck a relative of the prosecutrix to prevent an interference with commission of crime charged was admitted.[6] In a charge of rape, evidence that the accused searched and robbed the escort of prosecutrix immediately before commission of the crime charged was admitted.[7] (2) To prove identity of accused.[8] (3) Proof of a specific intent in a sexual crime is essential only in a charge of assault with intent to rape.

In prosecutions for rape, evidence of prior similar offenses committed by the accused upon females other than the prosecutrix is admissible where both offenses were committed upon the same occasion, *i. e.*, part of the *res gestae*.[9] Under this rule, the evidence

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[4] Underhill, Criminal Evidence (2nd Ed., 1910), 160; Shaffner v. Com., 72 Pa. 60 (1872), a leading case.

[5] Sect. 218.

[6] Thompson v. State, 11 Texas App. 51 (1881); Oakley v. State, 135 Ala. 15 (1902).

[7] State v. Taylor, 118 Mo. 153 (1893). There are many cases where, on a charge for murder of one person, evidence that accused also killed other persons is admissible on the ground that the several crimes were inseparably connected. Hickman v. People, 137 Ill. 75 (1891); State v. Perry, 136 Mo. 126 (1896); State v. Porter, 32 Ore. 135 (1891); State v. Hayes, 14 Utah 118 (1896); a leading case in which the facts did not come within the rule is People v. Molineux, 168 N. Y. 264 (1901).

[8] Vickers v. U. S., 1 Okla. Crim. 452, 461 (1908). In a trial for rape, evidence that accused had burglariously taken a weapon belonging to the witness just prior to crime charged was admitted to show the accused's identity. Dabney v. State, 82 Miss. 252 (1903). In a trial for rape, evidence of larceny in an adjoining room during the same night was excluded on the ground that the evidence was unnecessary to prove identity. The latter case appears to be the sounder law.

[9] As a matter of fact the principal case seems to conflict with a case in the same jurisdiction, People v. Abrams, 249 Ill. 619 (1911). In a prosecution for crime against nature, evidence of a similar act upon another child at the same time was admitted. The court said, p. 623, "but when the whole testimony is considered these contradictions [as to which of the children had been mistreated first] become unimportant. Both girls testified positively that the offense was committed upon each of them." In Harmon v. Territory, 15 Okla. 147, 159 (1905), upon a charge of common law rape, evidence that a sister of prosecutrix was contemporaneously raped in the same house by other men was admitted because it was relevant especially to show lack of consent and the use of force; the court took occasion to say (p. 162): "We conclude that the two

offered in the principal case should have been admitted and it is submitted that although the other offense was subsequent to the crime charged, yet it was so proximate in point of time as to give color to and corroborate that crime.

In a charge of assault with intent to commit rape the admission of evidence of similar offenses upon other females for purpose of proving the specific intent can hardly be said to be any wider. Wigmore[10] says: "Accordingly, where the charge is assault with intent, former acts of the sort should be received without any limitation except as to time; though the courts can hardly be said to have accepted this result fully."[11]

In prosecutions for sexual offenses, the weight of authority is decidedly in favor of the admission of similar offenses between the same parties which were prior to the crime charged.[12] The reasons given are various, *e. g.*, as corroborative evidence; as tending to characterize or explain the crime charged; to show the true relation existing between the parties; and to show a specific intent where that is necessary. As to the admissibility of subsequent offenses between the same parties the authorities are in conflict, the weight of authority and better reasoning seeming to reject

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crimes . . . . are so interwoven in their details and circumstances that the proof of one is corroborative evidence of the other." In Proper v. State, 85 Wis. 615, 628 (1893), in a charge of rape, evidence that the accused had sexual intercourse with another girl in the same room upon the same occasion was admitted as corroborative evidence.

In the following cases the evidence was rejected as irrelevant: Janzen v. People, 159 Ill. 440 (1896); State v. LaMont, 23 S. D. 174 (1909); Nickolizack v. State, 75 Neb. 27 (1905).

[10] Evidence, Vol. I, p. 432.

[11] Such evidence was admitted in State v. Desmond, 109 Iowa 72 (1899); State v. Sheets, 127 Iowa 73 (1905); in the latter case it does not appear whether the other offenses were prior or subsequent to the crime charged; at any rate, all occurred upon the same occasion.

The evidence was rejected in State v. Walters, 45 Iowa 389 (1877); State v. Marselle, 43 Wash. 273 (1906); Webb v. State, 7 Ga. App. 35 (1910); McAllister v. State, 112 Wis. 496 (1901); in the latter case the prior assault was committed only one hour before the assault charged; case is regarded as unsound by Wigmore.

[12] Wharton, p. 170; Lawson v. State, 20 Ala. 65 (1852); People v. Boers, 13 Cal. App. 686 (1910); Bigcraft v. People, 30 Colo. 298 (1902); Brevaldo v. State, 21 Fla. 789 (1886); Bass v. State, 103 Ga. 227 (1897); State v. Walters, 45 Iowa 389 (1877); People v. Gray, 251 Ill. 431 (1911); State v. Snover, 64 N. J. L. 65 (1899); People v. O'Sullivan, 104 N. Y. 481 (1887); State v. Guest 100 N. C. 410 (1888); Com. v. Bell, 166 Pa. 405 (1895); in State v. Sykes, 191 Mo. 62, 80 (1905), evidence that accused aided and abetted the commission of rape by another male upon the prosecutrix was admitted as part of the *res gestae;* in U. S. v. Griegs, 11 N. M. 392 (1902), evidence of an adulterous act committed four years previously was admitted.

Contra, Rex v. Floyd, 7 Car. and P. 318 (1833); State v. Riggio, 124 La. 614 (1909); State v. Dlugozima, 7 Dela. 151 (1909); State v. Bates, 10 Conn. 372 (1834); Barnett v. State, 44 Tex. Cr. 592 (1903), overruling Hamilton v. State, 36 Tex. Cr. 372 (1896).

such evidence.[13] In one of the cases,[14] it was said: "Proof of previous acts of sexual intercourse would tend to show a much greater probability of the commission of a similar act charged to have occurred subsequent thereto, but the converse of this proposition would not be true, as the proof of a crime committed by parties on a certain day could have no tendency to prove that they had, previous thereto, committed a similar offense."

I. B.

MORTGAGES—MERGER—SUBROGATION—In a recent English case of involved facts the time-honored rule of merger was applied in spite of the fact that the case arose in chancery, where the oft expressed doctrine that equity looks with disfavor on merger originated.[1] As is too often the case, if one is to believe the decision, the outcome was due to the "stupid ingenuity" of the unsuccessful litigant's solicitor. In order to transfer a mortgage and the equity of redemption at the same time to separate parties, the defendants in this action, the mortgagee deeded back the premises to the mortgagor, which is necessary under the English theory of the mortgage. The mortgagor then conveyed by warranty deed to one of the defendants, who in turn executed a mortgage to the other defendant for the same amount as the replaced encumbrance. The three deeds were executed within the space of forty-eight hours. There was a second mortgage unknown to all the parties but the original mortgagor. It was held that the second mortgagee was entitled to priority. At first blush this would seem a clear case of extinguishment. The debtor has paid his debt, the mortgage is cancelled and the second lien arises to a new dignity. That a mortgagor cannot set up one mortgage which he has discharged against a later one of his own making is legal gospel.[2] A reason frequently

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[13] Pope v. State, 137 Ala. 56 (1903); State v. Markins, 95 Ind. 464 (1884); People v. Fowler, 104 Mich. 449 (1895); St. v. Palmberg, 199 Mo. 233 (1906); People v. Robertson, 88 N. Y. App. Div. 198 (1903); Smith v. State, 44 Tex. Cr. 137 (1902).

Admitted in Crane v. People, 168 Ill. 397 (1897); Com. v. Nichols, 114 Mass. 285 (1873); State v. Witham, 72 Maine 531 (1881); State v. Robertson, 121 N. C. 551 (1897); State v. Bridgman, 49 Vt. 202 (1876).

[14] People v. Clark, 33 Mich. 112, 115 (1876).

[1] Manks v. Whitely, 81 L. J. Ch. D. 457 (1912), reversing the decision of Parker, J., 80 L. J. Ch., 696 [1911], Fletcher-Moulton, L. J., dissenting.

[2] Otter v. Vaux, 6 De G. M. and G. 638 (Eng., 1858); Lewin on Trusts, Vol. 2 (8th Ed.), § 728; Pomeroy, Eq. Juris., Vol. 2, § 797. Purchase of mortgage by trustee in bankruptcy of mortgagor does not existinguish it, Brown v. Lapham, 3 Cush. 551 (Mass., 1849). The mortgagor's payment of the mortgage does not extinguish it as to a purchase, from him, of the equity of redemption, Stillman v. Stillman, 21 N. J. Eq. 126 (1870); Stanhope's Estate, 184 Pa. 414 (1898).

If a purchaser of the equity of redemption personally assumes the mortgage, an assignment of it to him operates as an extinguishment, Burke v. Abbot, 109 Ired. 1 (S. C., 1885); McCabe v. Swap, 14 Allen 188 (Mass., 1867); Jones, Mortgages, § 864. *Contra*, Young v. Morgan, 89 Ill. 199 (1878). On the other hand, subrogation was allowed when the premises were sold subject to